La Favorita, Inc. *and* United Food and Commercial Workers Union, Local No. 7. Case 27–CA–11386

January 29, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 3, 1991, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt his recommended Order as modified herein.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, La Favorita, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.''

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's citation to a pending proceeding before the Board refers to *La Favorita, Inc*., 302 NLRB 849 (1991).

A. E. Ruibal, Esq., for the General Counsel.
Steven H. Dymond, Esq. (Mountain States Employers Council), of Denver, Colorado, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard the above-captioned case in trial in Denver, Colorado, on February 26 and 27, 1991. On July 17, 1990, United Food and Commercial Workers Union, Local No. 7 (the Union) filed a charge alleging that La Favorita, Inc. (Respondent) violated Section 8(a)(1) and (4) of the Act. On October 17, 1990, the Regional Director for Region 27 issued a complaint and notice of hearing. The complaint alleges that agents of Respondent threatened employee Petronilo Garcia with retaliation, suspended Garcia for a day, reduced his hours of work, and ultimately constructively discharged Garcia, because Garcia gave testimony against Respondent in a Board proceeding. Respondent denies that it has in any way violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including the briefs filed by the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material Respondent has been a Colorado state corporation with an office and places of business in Denver, Colorado, where it has been engaged in the baking and selling of flour and corn tortillas and the operation of a delicatessen/restaurant.

Respondent, in the course and conduct of its business operations, annually purchases and receives goods, materials, and services valued in excess of $50,000 from other enterprises within the State of Colorado that received the goods, materials, and services directly in interstate commerce. Respondent annually sells and ships goods, materials, and services valued in excess of $50,000 directly to other enterprises within the State of Colorado that are directly engaged in interstate commerce.

The parties agree, and I find, that Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On October 24, 1990, Administrative Law Judge Clifford H. Anderson issued his decision in *La Favorita, Inc*., JD(SF)–106–90 finding that Respondent had violated Section 8(a)(3) and (1) of the Act.[1] The hearing was held on various dates in April and July 1990. Petronilo Garcia testified as a witness for the General Counsel on April 3, 1990. The General Counsel contends that Respondent retaliated against Garcia because of his testimony and ultimately caused Garcia to seek employment elsewhere.

Respondent is a corporation principally owned by Gilbert Gamez and Sylvia Gamez, husband and wife. Respondent has two facilities, a tortilla bakery and a restaurant/delicatessen a few miles away. On September 20, 1989, a rep-

[1] Respondent filed timely exceptions to Judge Anderson's decision. The case is now pending before the Board on those exceptions.

resentation petition was filed by the Union. A Board-conducted election was held on November 3, 1989. The Union did not receive a majority of the votes cast in the election. In his decision, Judge Anderson recommended that the election be set aside based on certain unfair labor practices committed by Respondent.

B. *The Facts*

As stated earlier, Petronilo Garcia testified before Judge Anderson on April 3, 1990. The next day, while Garcia was working he was approached by Gilbert Gamez. Gamez angrily told Garcia that he wanted to remind Garcia that he signed the employee's paycheck. Gamez said the paychecks did not come from the Union or the street.

Gamez testified that, after he observed 70 to 80 pounds of burnt tortillas on the work floor, he approached Garcia. According to Gamez, he told Garcia to turn down the heat and Garcia responded by cursing him. It was at this point that Gamez said, ''remember who signs your check.'' Gamez denied saying anything about the Union.

I have decided to credit Garcia's version of this conversation over that of Gamez. Gamez was intent on denying those events and statements attributed to him which he felt were inconvenient or embarrassing. I do not believe he felt constrained by the truth to fully describe events as he recalled them. Further, Gamez was unable to establish through documents or witnesses that there had ever been a situation where 70 to 80 pounds of tortillas had been burned or that Garcia cursed him. His own foreman was unaware of such an incident. Further, during the same period, Gamez had made notes in a daily journal of certain employee indiscretions. However, he made no notes of the alleged burnt tortillas or the alleged cursing by Garcia. The above factors, in consideration with the demeanor of both witnesses, leads me to conclude that Garcia's version of these events should be credited over Gamez' denials.

Garcia testified that on April 5 he asked for permission to leave work early to attend traffic court. Gamez told Garcia to leave for the day and the following day as well. Garcia had, on previous occasions, received permission to leave work without a problem. Gamez testified that Garcia wanted time off and did not know whether he could return the next day. Gamez told Garcia to take both days and that he would use a ''floater.'' For the reasons stated above, I credit Garcia's version of these events.

On April 28, Garcia reported for work at 6 a.m. Garcia told the foreman, Leonard Romero, that he would have to leave work because his child was in the hospital. Romero told Garcia that he would have to check on the availability of other employees. Romero later sent word that Garcia did not have permission to leave. Garcia waited until the flour machine stopped, punched his timecard, and left work. While Garcia was leaving, he was approached by Gamez and told that he could not leave work. Garcia told Gamez that he had to go to the hospital because of his child's illness. Gamez responded that if Garcia left he would be fired. Garcia then went to the hospital.

Gamez testified that he observed Garcia leaving and asked why the employee was leaving. According to Gamez, Romero came over to talk to Garcia and that he left Romero to handle the situation. For the reasons stated above, Gamez is not credited.

Romero testified that he was approached by Gamez and told that Garcia was leaving. Romero approached Garcia and asked why the employee was leaving. Garcia said that he had to leave and Romero asked him to stay. Garcia left even after Romero told the employee that he did not have permission to leave. Romero intended to discharge Garcia but when Garcia returned the next day with a note from his child's doctor, Garcia was put back to work. The decision to allow Garcia to return to work was made by Lee Batchelor, Respondent's comptroller. Batchelor was called as a witness by Respondent but was not questioned as to this incident.

Garcia testified that when he returned to work the next day, his timecard was missing. Garcia gave a written note from his child's doctor and was permitted to return to work. Garcia's account of these events is credited over that of Gamez and Romero.

Garcia testified that on June 21, Romero did not permit him and other employees to punch in because work was not immediately available. Garcia and the other employees were permitted to clock in about an hour later. However, Garcia was given a warning for being late. No other employee was given such a warning. Respondent's timecards reveal that nine employees clocked in earlier than Garcia on that date. However, 12 employees clocked in later. There appears to have been a 25-minute delay on that date.

Respondent never explained why Garcia was deemed late or why the 12 employees who clocked in after Garcia were not considered late. At trial, Respondent offered no explanation for the discriminatory June 21 warning notice. In its brief, Respondent speculates that Garcia's tardiness caused the employees on his line to be late as those employees could not begin work until after Garcia had mixed the cornmeal. I do not find support for that speculation. First, the timecards show that there was a delay for all employees in starting. Secondly, if Garcia caused a delay on his line, Gamez or Romero could have so testified. The number of employees that checked in after Garcia does not fit the theory of Respondent's brief. More importantly, I am not persuaded by arguments in the brief which have not been supported by evidence. See *Madison South Convalescent Center*, 260 NLRB 816, 830 at fn. 10 (1982).

Prior to April 1990, Garcia worked 60 to 80 hours per week. Garcia worked on both the flour and corn tortilla lines until April 1990. Corn line employees usually finished their production first and then were assigned to help on the flour tortilla lines. In April 1990, shortly before testifying at the NLRB hearing, Garcia was assigned to the corn tortilla line on a permanent basis.

In May, Garcia asked Romero why he was no longer being assigned to the flour lines, after corn tortilla production had been completed. Romero answered that he was only following orders in sending Garcia home when corn tortilla production was completed.

Garcia's work hours were reduced because Romero sent him home when his work was completed. Previously a senior employee like Garcia would be allowed to remain at work and work on the flour lines. Such a senior employee would be given preference over a junior employee.

The record shows that Respondent experienced problems with the corn mix it purchased during the period from April to July 1990. The result was that corn tortilla sales and production were drastically reduced. However, this does not

completely explain Garcia's reduction in hours. Based on past practice, the question remains as to why Garcia was not permitted to rotate to the flour tortilla lines after work on the corn tortilla lines was completed.

Garcia's testimony concerning the past practice was credible. This testimony was corroborated by Respondent's records and the testimony of Romero. I further credit Garcia's testimony that he requested to work more hours but that Romero refused, stating he was following orders. In June 1990, Garcia found work at a hotel and worked two jobs until quitting work for Respondent on July 3, 1990.[2] Garcia testified that he quit work because he could not earn enough money working the hours assigned to him after April 1990.

Analysis and Conclusions

As indicated earlier, I have credited the testimony of Garcia that Gamez told him to remember who signed his check and that the checks did not come from the Union. These comments, coming on the heels of Garcia's testimony at the Board hearing the preceding afternoon, tend to threaten that Respondent will retaliate against employees who testify against Respondent or otherwise support the Union. I note that the record had not yet closed in the hearing. Accordingly, I find that Gamez' conduct violated Section 8(a)(1) of the Act.

I have credited Garcia that on the day following the threat found unlawful above, he asked for permission to leave work to attend traffic court. Gamez gave Garcia 2 days off. I find no credible explanation for the extra day off. Under all the circumstances, and particularly the earlier threat, I find that Gamez was attempting to establish that it was Respondent and not the Union that controlled Garcia's wages. Accordingly, I find that Respondent violated Section 8(a)(1) and (4) of the Act by suspending Gamez for testifying at the unfair labor practice hearing and/or for supporting the Union.

As set forth above, on June 21, Garcia was given a warning for being late although he had been prevented from clocking in for work. Other employees clocking in at the same time or later were not given warnings. No credible explanation for this disparate treatment was given. The explanation offered on brief is not supported by the evidence. The record compels a conclusion that the June 21 warning was simply a continuation of the earlier retaliation against Garcia for his testifying against Respondent and in favor of the Union.

The Board has held that a constructive discharge is established when it is shown that (1) the employer established burdensome working conditions sufficient to cause the employee to resign and (2) the burden was imposed on the employee because of his protected activities. *Crystal Princeton Refining Co*., 222 NLRB 1068, 1069 (1976); *Algreco Sportswear Co*., 271 NLRB 499, 500 (1984).

In *Algreco Sportswear*, an employee quit because she was discriminatorily receiving the lowest of three wage rates. The employee was not receiving a reduction in wages but receiving less than she was entitled to under a newly instituted system. Although the Board found that the wage rate paid to the employee was discriminatory, it refused to find that the burden imposed by the employer was so intolerable as to force the employee's resignation. ''The test is of necessity, an objective one, taking into account the circumstances of each case. The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge.'' 271 NLRB at 500. See also *KRI Constructors*, 290 NLRB 802, 813–814 (1988).

In *American Licorice Co*., 299 NLRB 145 (1990), the Board found a constructive discharge in the company's refusal to allow an employee to transfer to the night shift. The conditions on both shifts were equal. However, the employer knew that the employee needed to transfer to the night shift because she could not afford a babysitter for her children. The employer's discriminatory refusal to allow the employee shift preference was deemed a constructive discharge. The Board found a violation based on an unlawful motive for the denial of the transfer and the finding that the employer could have reasonably foreseen that its action would cause the employee to quit.

Here, I find that the discriminatory reduction in Garcia's hours of employment and resultant decrease in pay were so difficult and unpleasant within the meaning of *Algreco Sportswear* and *American Licorice*. I further find that these changes in working conditions caused Garcia to resign. Immediately following Garcia's testimony, Respondent embarked on a course of conduct designed to show Garcia that it had more economic leverage than the Union. Garcia told Respondent that he wanted to work more hours and he questioned why he was not permitted to do so. The evidence establishes a past practice in which such requests would be honored. I find that Garcia's resignation was a reasonably foreseeable consequence of the employer's conduct. Garcia had clearly indicated that he desired to work more hours. As Respondent's most senior employee, this preference would normally have been granted. The evidence reveals that Respondent was retaliating against Garcia because he testified against Respondent's interests or otherwise supported the Union. The reduction in hours was an integral part of the retaliation which commenced the day after Garcia testified. Whether Respondent intended that Garcia quit is immaterial. Under the circumstances, Respondent should have reasonably foreseen that the reduction in hours of work, with the resultant loss of pay, would cause Garcia to seek other employment.

Respondent must show by a preponderance of the evidence that it would have engaged in this same conduct in the absence of its unlawful motive. See *Wright Line*, 251 NLRB 1083 (1980). I conclude that Respondent has not met this burden. Respondent has shown a slowdown in its corn tortilla production, but Respondent has not shown that Garcia would not have been reassigned to work on the flour tortilla lines had Respondent not been concerned with demonstrating to Garcia that it was Respondent and not the Union who paid his wages. Under normal circumstances, Garcia would have been permitted to work on the flour tortilla lines once corn tortilla production was completed. Further, Garcia would have normally been given preference over less senior employees in terms of total hours. Thus, the decrease in corn

[2] Respondent's records reveal that, in his last 6 weeks of employment, Garcia worked fewer hours than other employees, including employees working along side him on the corn tortilla line. Thus, the records indicate that Garcia was sent home earlier than other employees similarly situated. The records contradict rather than support Respondent's contention that Garcia was treated the same as other employees working on the corn tortilla line.

tortilla production would affect some employees, but it should have had a lesser effect on Garcia. I note that the first case was still pending before Judge Anderson at the time of these events.

Under all the circumstances, I find that Respondent has not sustained its burden of proving that Garcia's hours of employment would have been reduced absent discrimination. Accordingly, I find that Respondent has violated Section 8(a)(4) and (1) of the Act as alleged in the complaint.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

I shall recommend that Respondent offer Petronilo Garcia full and immediate reinstatement to the position he would have held, but for Respondent's unlawful discharge of him in July 1990.

Further, Respondent shall be directed to make Garcia whole for any and all loss of earnings and other rights, benefits, and emoluments of employment he may have suffered by reason of Respondent's discrimination against him, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to its unlawful warning, suspension, and constructive discharge of Garcia from its files and notify him in writing that this has been done and that these actions will not be the basis for any adverse action against him in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of wages or other reprisals for testifying at Board proceedings or for engaging in union activities.

4. Respondent violated Section 8(a)(4) and (1) of the Act by issuing Garcia a warning, suspending Garcia for a day, reducing his hours of employment, and forcing Garcia to quit his employment in July 1990, because Garcia had testified at a Board proceeding and otherwise supported the Union.[3]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, La Favorita, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of wages or other reprisals because the employees testified at National Labor Relations Board proceedings or engaged in union activities.

(b) Issuing unwarranted warning notices to employees because they testified at Board proceedings or engaged in union activities.

(c) Suspending employees because they testified at Board proceedings or engaged in union activities.

(d) Reducing the hours of employment of employees, constructively discharging them, or otherwise discriminating against employees because the employees testified at Board proceedings or engaged in union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Petronilo Garcia immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole former employee Petronilo Garcia for any and all losses incurred as a result of Respondent's unlawful reduction of hours and constructive discharge, with interest, as provided in the remedy section of this decision.

(c) Expunge from its files any and all references to the warning notice, suspension, reduction of hours, and constructive discharge of Petronilo Garcia and notify him in writing that this has been done and that the fact of Respondent's unlawful conduct will not be used against him in any future personnel actions.

(d) Post at each of its Denver, Colorado facilities copies of the attached Notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 27, in English, Spanish, and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[3] While Respondent's conduct may violate Sec. 8(a)(3) as well as Sec. 8(a)(4), the charge and complaint only alleged a violation of Sec. 8(a)(4). Thus, I make no finding regarding Sec. 8(a)(3). The remedy is not affected by the absence of an 8(a)(3) allegation.

[4] All motions inconsistent with this recommended Order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with loss of wages or other reprisals because the employees testified at National Labor Relations Board proceedings or engaged in union activities.

WE WILL NOT issue unwarranted warning notices to employees because they testified at Board proceedings or engaged in union activities.

WE WILL NOT suspend employees because they testified at Board proceedings or engaged in union activities.

WE WILL NOT reduce the hours of employment of employees or constructively discharge employees because the employees testified at Board proceedings or engaged in union activities.

WE WILL NOT in any like or related manner interfere with our employees' exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer immediate and full reinstatement to employee Petronilo Garcia to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make employee Petronilo Garcia whole, with interest, for any and all losses he may have suffered as a result of our discrimination against him.

WE WILL expunge from our files any and all references to the warning notice, suspension, reduction in hours, and constructive discharge of Petronilo Garcia and WE WILL notify him in writing that this has been done and that these personnel actions will not be used against him in any way.

LA FAVORITA, INC.